

In The
Supreme Court of the United States

October Term, 1996

EDWARD S. COHEN

Petitioner.

vs.

HILDA DE LA CRUZ; NELFO G. JIMENEZ; MARIA
MORALES; GLORIA SANDOVAL; HECTOR SANTIAGO;
SANTIA SANTOS; ELBA SARAVIA; ELVIA SIGUENZIA;
ENILDA TIRADO.

Respondents.

*On Petition for a Writ of Certiorari to the United States
Court of Appeals for the Third Circuit.*

RESPONDENTS' BRIEF IN OPPOSITION

GREGORY G. DIEBOLD

Counsel of Record

Attorney for Respondents

Hudson County Legal Services Corp.

574 Newark Avenue

Jersey City, New Jersey 07306

(201) 792-6363

71424

(800) 3 APPEAL • (800) 5 APPEAL • (800) BRIEF 21

LAW
Appellate
Services, Inc.

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Respondents request that the Court deny the petition for a writ of certiorari seeking review of the decision of the United States Court of Appeals for the Third Circuit in this matter.

STATEMENT OF THE CASE

In 1989, the Hoboken New Jersey Rent Leveling Administrator determined that petitioner had violated that city's Rent Leveling Ordinance by charging his tenants nearly double the amount he could lawfully collect. Petitioner was directed to refund over thirty thousand dollars in illegally collected funds. Rather than do so, petitioner filed for Bankruptcy under Chapter 7 of the Bankruptcy Code. 11 U.S.C. § 701.

On February 14, 1991, respondents filed an adversary proceeding in the United States Bankruptcy Court for the District of New Jersey. Following a trial at which all parties testified, the court determined that petitioner's reckless disregard of the provisions of the Hoboken Code constituted fraud under 11 U.S.C. § 523(a)(2)(A). (App. to Petition for Certiorari, 19a).

Subsequently, the Bankruptcy Court held that petitioner's conduct also violated New Jersey's Consumer Fraud Act. N.J. Stat. Ann. § 56:8-2 (App. 36a). Judgment was entered in favor of respondents for treble the amount of the illegally collected rents, as mandated by the Act. N.J. Stat. Ann. § 56:8-19. Petitioner does not challenge either of these rulings. In fact both the majority and dissenting Judge in the Court of Appeals agreed without extended discussion that these rulings should be affirmed. (App. 5a, 14a).

However, the courts below went on to consider an issue not presented by petitioner to the trial court: whether 11 U.S.C. § 523(a)(2)(A) exempts punitive as well as compensatory damages from discharge. Although noting a division in the Circuits on this issue, all of the courts below concluded that

Section 523(a)(2)(A) barred the discharge of punitive damages awarded on account of fraud.

REASONS FOR DENYING THE WRIT

I.

THE ISSUE PRESENTED FOR REVIEW IS NOT CLEARLY IMPLICATED IN THIS CASE.

The Court should deny a writ of certiorari because this case does not clearly implicate the issue raised in the petition. The extent to which punitive damages awarded on account of fraud are dischargeable in Bankruptcy is an important issue which has divided the Courts of Appeal. Nevertheless, two factors compel the exercise of the Court's discretion to deny the writ.

First, the extent to which the damages awarded below are "punitive" is unclear. The Court of Appeals "assumed without deciding for purposes of this opinion that the treble damages provision of N.J. Stat. Ann. § 56:8-9¹ is purely punitive and does

1. The court undoubtedly meant N.J. Stat. Ann. § 56:8-19, which provides:

Any person who suffers any ascertainable loss of moneys or property, real or personal, as a result of the use or employment by another person of any method, act, or practice declared unlawful under this act or the act hereby amended and supplemented may bring an action or assert a counterclaim therefore in any court of competent jurisdiction. In any action under this section the court shall, in addition to any other appropriate legal or equitable relief, award threefold the damages sustained by any person in interest. In all actions under this section the court shall also award reasonable attorneys' fees, filing fees and reasonable costs of suit.

not serve a compensatory function." (App. 6a, note 2). The Court noted the suggestion by the Supreme Court of New Jersey that the purpose of the treble damage provision was partly compensatory. *Cox v. Sears Roebuck & Co.*, 647 A.2d 454, 465, 138 N.J. 2, 24 (N.J. 1994).

Second, the statutorily mandated treble damages awarded here, even though they serve at least a partly punitive purpose, are not commonly considered punitive damages. In recent years, this Court has grappled with the validity of such awards bearing no relationship to a plaintiff's actual loss. See, e.g., *BMW of North America v. Gore*, 116 S. Ct. 1589 (1996). Unlike such discretionary and often arbitrary verdicts, the damages awarded here are a mandatory consequence of petitioner's fraud under New Jersey law. Moreover, the damages are directly related to the victims' compensatory damages, and are hardly excessive.²

Given these considerations, petitioner can hardly portray himself as an "honest but unfortunate debtor" victimized by a discretionary award bearing no relationship to respondents' actual damages. *Grogan v. Garner*, 498 U.S. 279, 286-87 (1991). Rather, as the District Court observed:

Unlike a discretionary imposition of punitive damages, the non-compensatory aspect of the award in this case was codified and therefore entirely foreseeable by the debtor at the time he made the false representations to the plaintiffs. In this sense it may properly be seen as the debt he incurred through his conduct, rather than as punishment. (App. 35a).

2. The New Jersey Act provides relief only if the person defrauded suffers an "ascertainable loss" and only economic losses are compensable. *Garcia v. General Motors Corp.*, 910 F. Supp. 160 (D.N.J. 1995).

Because the judgment sought to be reviewed here does not present a typical example of a discretionary award of purely punitive damages, the Court should not utilize this case to resolve the important issue presented.

II.

THE ISSUE OF DISCHARGEABILITY OF PUNITIVE DAMAGES WAS NOT RAISED BY PETITIONER BEFORE THE TRIAL COURT.

Sup. Ct. R. 15.2 admonishes counsel for the respondents to point out procedural impediments to the Court's consideration of an issue raised in the petition for certiorari. In compliance with this rule, respondents note that petitioner never raised the issue of dischargeability of punitive damages before the Bankruptcy Court. (App. 51a).

Respondents do not claim they were prejudiced by petitioner's failure to raise this issue in the Bankruptcy Court, since they fully briefed the issue before both the District Court and Court of Appeals. However, because review in this Court is discretionary, the failure of petitioner to raise the issue in the first instance to the trial court would support the denial of the writ.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

Gregory G. Diebold, Esq.
Counsel of Record
Attorney for Respondents
Hudson County Legal Services Corp.
574 Newark Avenue
Jersey City, New Jersey 07306
(201) 792-6363